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Book Reviews

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BOOK REVIEWS

THE LAW OF THE SOVIET STATE. By Andrei Y. Vyshinsky. New York: The Macmillan Company, 1949. Pp. xvii, 749. \$15.00

THE ROLE OF THE SOVIET COURT. By I. T. Golyakov. Washington, D. C.: Public Affairs Press, 1948, Pp. 20. \$1.00.

SOVIET CIVIL LAW. By Vladimir Gsovski. Ann Arbor: University of Michigan. Volume I, 1948. Pp. xxxvii, 909. Volume II, 1949. Pp. xx, 906. \$10.00 per volume; \$15.00 per set.

The leaders of the Communist Party of America have recently been convicted of violating a federal statute that makes it unlawful, *inter alia*, to "knowingly or willfully advocate . . . or teach the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence."¹ Now admittedly, all these defendants are loyal party members. Further, we may judicially notice the inviolate sympathy that exists between the defendants and unnamed persons in Moscow. This is by way of introducing Andrei Y. Vyshinsky. He is the Soviet Union's Foreign Minister (October, 1949). He was the State Prosecutor in the Moscow trials of 1937-38. This sustained and increasing evidence of being in good standing makes his writings of 1936² have such authority that we may assume that Eugene Dennis & Co. believe and advocate what he declares to be the proper approach to law and politics. An examination of Vyshinsky's book goes far to explain why the United States Government is taking such a dim view of the activities of the leaders of the Communist Party in this country, although further evidence would seem cumulative. Vyshinsky's language is that strange jargon peculiar to the Marx-Engels-Lenin-Stalin cult. He makes no distinction in the historical setting of the words of these four demigods and, in reporting upon him, none will be made here. We start out with his basic definition: "Marxism-Leninism . . . teaches . . . that law is merely the will of the dominant class, elevated into a statute."³ When a new class becomes dominant, its will must replace in every aspect of life, the respective bases of its predecessor. With this premise we should not be shocked at the section heading in this book which reads: "The Demolition of the Machinery of the Bourgeois State,"⁴ because this demolition and its replacement is "the most important

1. 18 U. S. C. A. § 2385 (1948). The indictments were actually brought under the old Code sections. 54 STAT. 671 (1940), 18 U. S. C. A. §§ 10, 13 (Supp. 1948).

2. This is the date of publication stated by the writer of the Introduction, but Vyshinsky's text on page 524 indicates a date of publication subsequent to August 17, 1938. There is a footnote reference to a law passed August 21, 1938 (p. 194).

3. VYSHINSKY, 13.

4. *Id.* at 62.

problem of the Marxist-Leninist doctrine of the state.”⁵ There is no intimation that the destruction of bourgeois governments will come about peacefully. If the Communists expect power and have this aim in mind when power is achieved by them, it seems to follow that prior to achieving power they have, in this country, placed themselves within the terms of the statute from which they are at present trying to extricate themselves. There is no intention here to labor the point. The federal statute may mean that regardless of what is done after the power is achieved, it is unlawful to advocate violence in order to achieve it. But whether force be used before or after any Communist political victory in America, the Government of the United States will be the major victim. This follows on the theory that this is a constitutional government which includes a Bill of Rights.⁶ Vyshinsky makes clear that he believes that the Bill of Rights is but another sham used by the dominant classes to ensure their deeper entrenchment. As he says:

“The annihilation of private property in the means and instruments of production, and the creation of socialist property in the means of production, signifying the emancipation of the toilers from the chains of capitalist slavery, mean thereby the creation of a firm basis for true democracy, for true political freedoms and equality of civil rights.”⁷

A responsible official of a Communist Party in power has thus announced that wherever a Communist party gains control over a national government it will establish a Communist law the objectives of which are (1) to develop and aid the toilers and (2) to annihilate “completely and finally, capitalism and its survivals in the economy, manner of life, and consciousness of people.”⁸ Certainly this is a fair warning delivered by a Soviet official in good repute and embodied in a reference book for Soviet administrators and jurists.

Having established this foundation, Vyshinsky then discusses the Stalin Constitution of 1936 because this basic document provided the framework for the play of Soviet law over all the affairs of the Soviet system. The details of this constitution and what it is supposed to do, according to Soviet legal theory, are then stated at length. This statement has its peculiarities. Addressed to persons who have withstood the most searching of personal investigations in order to qualify for public office, who are dedicated to this national religion, who would not support or tolerate an opposing political point of view, and who would not be likely to meet anyone who did, why then must this book be so furiously argumentative? There seems to be no point in fuming and raging with your colleagues to establish positions over which everyone is in complete agreement. The writer of the Introduction to this book declares that this work

5. *Ibid.*

6. In considering the rights of citizens of the U. S. S. R., Vyshinsky discusses the “Virginia Declaration of Rights of 1776 (U. S. A.). John Adams, who drafted this Declaration. . . .” (p. 541). The context shows that the author knew this latter document to be different from the Declaration of Independence, which was “The first act of the United States.” (p. 542.)

7. P. 552.

8. P. 74.

manifests the militant and uncompromising spirit of the Soviet pedagogical method. It also sounds as though the whole philosophy of the Soviet state must be hammered into the heads of its most ardent disciples.

Professor Lon Fuller of Harvard University is appalled at the emptiness of the conceptual content of Vyshinsky's work.⁹ He regards the volume as a polemic addressed to the task of destruction of political opposition rather than being a reasonable analysis of the virtues of the Soviet jurisprudence. This is a true observation but not necessarily to be deplored. According to Vyshinsky, if Russian law is today superior to all others, it is primarily because the proponents of other legal systems are ignorant bandits. This of course does not logically create a *prima facie* case in favor of Soviet legal theory but this habit of deprecating the efforts of all who are not in good standing in the Party lends force to a common belief that the police state is trapped into publicly exhibiting its psychopathic nature. The pathetic claims of priority in basic discoveries and inventions placed alongside of perversions of science for political ends, as in the recent plebescite on the validity of the Mendelian hypotheses, exhibit an unmistakable appearance of mental illness. Returning to the field of law, we may be confident that no American Attorney General would feel impelled to advise his subordinates that the writers on Continental Civil Law were universally men of low morality and invariably victims of their own lack of intellectual power. Why then must every Soviet jurist and administrator be blessed with a copy of this type of handbook? The answer certainly appears reasonable that this is a political tract, that it does state the party line from the lawyer's point of view, that it does so forcefully and plausibly, and that under the circumstances, this is the important thing both for the Soviet jurist and for the American reader. It may well be that we have much to learn from the Soviet legal system.¹⁰ What that is—aside from our good fortune in being from it—is not revealed in Vyshinsky. But we can learn much about the minds of our most apparent foe from this book and we should on the general principle of "Know your enemy."

The Great Fatherland War worked no changes in the Soviet attitude towards law. In 1947, the Chief Justice of the Supreme Court of the Soviet Union¹¹ reaffirmed in the usual language the views on this subject expressed by Vyshinsky. Golyakov's lecture again points out the political character of Soviet public law. The major duties of a judge are said to be (1) the removal of anti-state tendencies in criminals and (2) the education of the masses during the process of meting out justice to criminals. This educational role evidently contemplates a haranguing of the parties in a trial and orations directed at those

9. Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 MICH. L. REV. 1157 (1949).

10. See Berman, *The Challenge of Soviet Law*, 62 HARV. L. REV. 220, 449 (1948-49).

11. In 1946 this Court consisted of 46 justices and 25 assessors. 1 GsovSKI, 261.

who are attending the proceedings. Because of this duty the political education of the judge is emphasized and "a judge who has a general political training easily masters the necessary juristic knowledge."¹²

On the premise that a thief is interfering with the operation of the national economy and, according to Stalin, "is a spy and traitor if not worse,"¹³ both Golyakov and Vyshinsky leave the inference that the criminal law is regarded as part of the public law. This leaves open the whole area of the relations of the citizens among themselves. Into this gap have come the two volumes of Dr. Gsovski.

Without argument, it may be taken as true that there must be some set of principles available to govern the relations of citizens of a state with other citizens of the same state. There must be a private as distinguished from a public law. And, of course, the Soviet Union is no exception. The basic elements of the private law of the Soviet Union are brought together in two volumes by Dr. Gsovski who is at present chief of the Foreign Law Section of the Library of Congress. The value of these two volumes as a survey of the vast field they cover is not debatable. The material here presented is not otherwise available in English. Volume II consists of hundreds of pages of translation of the text of Russian codes and statutes including some passed as late as August, 1948.¹⁴ These translations are accompanied by short historical annotations. There is the further addition of a 30-page bibliography of Russian legal works and a 120-page index of references to Soviet statutes. Volume I consists of an integration of this vast quantity of material into a comparative and historical survey. The law of other European states as well as that of Imperial Russia is stated as a background for the tale of the unstable development of Soviet law in the various fields. For instance, the early Soviets regarded fault as the basis for tort liability as something peculiarly capitalistic. The social interest in compensating the injured worker seemed to justify the principle of "naked" causation.¹⁵ Gsovski is satisfied that this stand has now been rejected. This example is a good indication of the result of being determined not to have any traditions. Indeed statutes were passed which in so many words forbade any "citation of the laws of the overthrown government."¹⁶ This naturally threw a tremendous burden upon the judges, but they were shortly to be given a very useful criterion to use in their work. The Code of Civil Procedure states in Section 4 that :

12. GOLYAKOV, 20.

13. *Id.* at 3.

14. On August 26, 1938, a statute was passed granting to every male or female citizen of the U. S. S. R. "the right to buy or to erect for himself or herself, in personal ownership, a residence house of one or two stories with the number of rooms from one to five inclusive, in a city as well as outside of a city." 2 GSOVSKI, 844.

15. 1 *id.* at 497.

16. 1 *id.* at 157.

"In the absence of a legislative enactment or a decree bearing upon the decision of a case, the court shall decide the case guided by the general principles of soviet legislation and general policies of the workers' and peasants' government."¹⁷

Judicial legislation, the arch-demon among ourselves, is here declared to be the approved procedure. Presumably one should condemn the practice were it not for an aversion to resembling the pot calling the kettle black. The virtue, if it may be so termed, of our position is that we generally recognize the shift in sovereignty that takes place when the courts generally show personal preferences in their decisions. Speaking as one alien to the Soviet system, their codes read well and give an air both of reasonableness and rationality. But we have come to regard the cleavage between Soviet pretensions and practice as being so great as to be probably impassable. Before the study of Soviet law becomes truly fruitful we shall, this writer believes, have to have more firsthand information about everyday experiences in Russian courts. American students will have to be granted permission to study in Soviet law schools. And that day will also include the time when commercial relations between the two countries will have reached the point where an American businessman would bother to carry on litigation in a Soviet court.

STANLEY D. ROSE*

MISSOURI LAWYER. By John T. Barker. Philadelphia: Dorrance & Company, 1949. Pp. 391. \$3.50.

Almost any autobiography of a lawyer has some appeal for other lawyers who are always interested in learning how another solved the problems that confront or have confronted them and what of toil and amusement a fellow traveler found on his way. This autobiography, however, is more than usually readable and entertaining—probably because the author is a vivid personality.

John T. Barker is a typical lawyer who had a typical career in a typical state. A typical lawyer, both in appearance and in reality—this man who looks out from the dust jacket with an habitual, quizzical half-smile. No recluse or recondite here, but one who likes to mingle with his fellowmen, who knows their faults and forgives them; one who loves the written and even more the spoken word, who is himself highly articulate as a speaker, a conversationalist, and a raconteur; one who loves his profession; one who is the confidant, confessor and adviser of his friends and neighbors; one who is equally at home in his office, the court room, on the hustings and in the legislative hall; one who has lived and is still living a full and comprehending life; a careful student of the past and a keen observer of the passing scene.

17. 2 *id.* at 555.

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A typical career, because John Barker has been no specialist advising in the seclusion of his office. He has been a general practitioner and a trial lawyer in all fields of the law, including criminal law. His keenest enjoyment is in the thrust and parry of the court room. He has tried all kinds of cases and has had many different clients—including one Harry Truman. He has the gift of lively and dramatic narrative and his stories of his trials—particularly of the murder cases in which he has participated—not only make good reading, but are instructive case histories.

Mr. Barker's excursions from the private practice have also been typical. He has been City Attorney of Kansas City. He has tramped on the Chautauqua Circuit. He has been Speaker of the Missouri House of Representatives, Attorney General of that state and an unsuccessful candidate for Governor. He is now a special assistant to the Attorney General of the United States.

A typical state? At least the people have recently demonstrated that they are not averse to the Missouri type.

Mr. Barker is charmingly discursive. Outside the scope of his own autobiography he writes of many things of interest to lawyers—of great trial lawyers of our time and of other days, of the personalities of the English and American Bars whom he has known, of the American Bar Association.

He does not confine himself to topics which appeal only to lawyers. Indeed, much of the value of his book derives from his discussions from the point of view of a lawyer of subjects of general interest.

Some of his chapters are source material for history. He has caught the atmosphere and told the story of Western Missouri during and just after the War Between the States and has contributed to a better understanding of the sympathy of that part of the state for the cause of the South, and of its sufferings at the hands of the Kansas jayhawkers. The chapter titled "Frank and Jesse James" is an excellent explanation of the reason those outlaws were able for so many years to operate unmolested.

Mr. Barker does not confine himself to reflecting upon and interpreting past history. He is an authentic witness to much that he has seen—especially in his home town, Kansas City. Here perhaps will be found the residual value of his book. No one knows more of or is better qualified to tell the story of his own city than an active lawyer like Mr. Barker who has seen it all—as a member of the audience, as a backstage observer, and frequently as an actor or director. From each of these vantage points Mr. Barker has viewed Kansas City and from each of them he tells its story. The hero of his piece is William Rockhill Nelson, the founder of the *Kansas City Star*. There is a temptation to say that the villain is Thomas J. Pendergast. This, however, would not be quite fair. Mr. Barker, after relating the facts of Pendergast's life, concludes: "Like the vast majority of people, his character was a mixture of good and

bad, of strength and weakness . . . That he was guilty of political and business irregularities is probably almost certainly true. That he was personally kindly and charitable is well established . . . His flair for horse racing and his great desire for money, qualities possessed by countless other Americans then and now, brought about his ruin . . . That the political position which he occupied for so long created an unhealthy political situation in Missouri is beyond doubt, since no one man should, in a democracy, wield the power which he possessed. People will remember his great capacity for friendship, his ready charity, and the fact that his word, once given, would be kept regardless of subsequent circumstances . . . Pendergast was reared in a time and place when nice distinctions between right and wrong were not made to as great a degree as they now are . . . His life was colorful, meteoric, and in many respects typically American."

I remember the time (not so long ago) when last I saw John Barker. I was walking down one of the seemingly endless corridors of the Justice Building in Washington. I heard a quick step behind me, and felt a light tap on my shoulder; I turned and there was "the General," as his friends always call him. As we had done often before, we walked and talked together out on to Pennsylvania Avenue, heedless of the homeward bound throng of Government workers. He was interested in telling, and I more interested in hearing, the story of his life in Washington. He was living then—as now—at the Wardman Park, and chatted of the Washington personages who make their home there, telling of the foregatherings in the evenings when they all talked of Washington past and present. To me it was delightful conversation; to the reader it will be equally delightful, for it has become the penultimate chapter of this autobiography.

WALTER P. ARMSTRONG*

MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300-1629. By Faith Thompson. Minneapolis: University of Minnesota Press, 1948. Pp. x, 410. \$6.50.

In 1647, shortly after the defeat of the armies of Charles I, Sir Thomas Fairfax, commander of the victorious parliamentary troops, on a visit to the Tower of London, called for Magna Carta. "This is that," he said when it was showed to him, "which we have fought for, and by God's help we must maintain."¹ The enthusiastic view of Magna Carta as the palladium of the liberties of the Englishman (and American) held the field until about

1. 3 GARDINER, HISTORY OF THE GREAT CIVIL WAR, 1642-1649, 346 (2d ed. 1904).

* Member, Armstrong, McCadden, Allen, Braden & Goodman, Memphis, Tennessee. Mr. Armstrong's sudden death on July 27, 1949, came as a distressing shock to the whole American Bar.

the close of the last century. About that time historical writers began to point out that the Great Charter was a purely feudal document, wrested from King John by a group of aristocratic ruffians at the head of the baronage, that it proclaimed privileges for a class which made up about one-fifth of the nation, and that it was all but forgotten in the later middle ages until Coke refurbished it and it became the chief weapon in the armory of the opponents to the royal prerogative. As Pollard wrote in 1926, "one of the greatest historical services rendered by parliaments has been to abolish the liberties of the Great Charter, and transform 'liberty' from the privilege of the baron into the common inheritance of the English people."²

More recently the pendulum has begun to swing back. Two years ago Professor Radin subjected Magna Carta to a close study and showed conclusively that it was not by any means forgotten after 1215, rather "was thought of as something more than the most venerable of statutes."³ Now Miss Faith Thompson, Associate Professor of History at the University of Minnesota, who has already made a notable contribution through an earlier work,⁴ re-examines the whole subject in an admirable study based on exhaustive research in the whole literature of the constitution, manuscript and printed, contemporary and modern.

Of special interest to members of the legal profession will be her treatment of chapter 39 of John's Charter of 1215, and the way in which it became regarded as the guarantee of due process of law. "No freeman," ran the phrase, "shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land." According to Miss Thompson the fourteenth-century sources contain more references to this clause than to any other, and it is clear that its reputation was well established. Two tendencies are seen in the medieval concept of due process of law: first, a protest against "unlawful procedure—the being seized and imprisoned without being arraigned or called in judgment" (p. 80), and second, the frequent insistence by bishops and lay peers on trial by peers. Since in either case the appeal lay to Magna Carta, it is quite clear that the instrument was by no means forgotten. Nor was it the concern of the baronage alone, for Miss Thompson demonstrates conclusively the steady interest manifested by the residents of the City of London and the upper clergy in the special provisions of the Charter in which they were comprehended.

The fallacy of the older view, that Magna Carta rested in the shade

2. POLLARD, *THE EVOLUTION OF PARLIAMENT* 11 (2d ed. 1926).

3. Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060 (1947). Miss Thompson does not refer to this paper—apparently it appeared too late for her to use.

4. THOMPSON, *THE FIRST CENTURY OF MAGNA CARTA: WHY IT PERSISTED AS A DOCUMENT* (1925).

in the Tudor period, is amply exposed by Miss Thompson in Part II of her work. The evidence to support it was never very adequate, consisting as it did of such grounds as Shakespeare's failure to refer to the Charter in *King John*. Miss Thompson explains this failure by showing that the times of Henry VIII and Elizabeth were not propitious for the representation of John as a tyrant, that after the Reformation it was more natural for him to be portrayed as "the innocent victim of an overweening papal power" (p. 165). That the Charter did not disappear in the sixteenth century is proved by frequent reprintings and allusions by the chroniclers which Miss Thompson cites. Indeed it was in Elizabeth's reign that legal antiquarians such as William Lambarde fostered the error that the "judgment of his peers" of chapter 39 was synonymous with trial by jury. Lambarde is one of the best examples of the tendency to exaggeration which reached a climax under James I and Charles I, the tendency which saw in Magna Carta "the first Letters of *Manumission* of the people of the *Realme*, out of the *Norman* servitude" (pp. 188-89).

With this interpretation being ever more widely popularized, it was only natural that minority groups such as the Puritans should appeal to Magna Carta in their resistance to enforced conformity. The general outlines of the struggle against the prerogative under the early Stuarts is well known; what Miss Thompson contributes is a clear account of the interpretation of and appeal to the Charter by the lawyers and statesmen of the period. The government's reasoning, so often neglected, is here made clear: as Bacon is supposed to have argued, to have allowed the opponents' interpretation of chapter 39 would have brought to a halt the machinery of everyday justice as enforced not only by the Privy Council but by the justices of assizes and justices of the peace as well. It would have resulted in a "general impunity" (p. 283).

One of the most striking contributions of the book under review is the author's discussion of chapter 39 in the Inns of Court. The readings, or law lectures, of Francis Ashley in his Inn of Court in 1616, which she found in the Harleian MSS., furnish an excellent illustration of the extremes to which the Charter had been pushed. "The Law of Lawes . . . the Statute of Statutes . . . for it is as much worth as our Lyves or estates are worth, and the extent is as large as anything we have which we hold pretious." And again, "In brief by vertue of this statute we have property in our goods tytle to our Lands Libertye for our persons and safety for our Lyves . . . by force of this Statute every free Subject may have remedy for every wrong don to his person, Landes or goods" (p. 288).

The culmination of thought such as Ashley's is treated by Miss Thompson in her last chapter, on "Coke's Commentaries: Summation of Three Centuries," where she analyzes the pertinent parts of the *Institutes* and

shows the reliance placed upon them by the leaders of the popular party. The Coke who emerges from these pages is neither the Coke to whom radicals like Lilburne were to appeal, nor the Coke whom the iconoclasts of a generation ago were so fond of berating. Neither group was fair to him; the former found in the *Institutes* the doctrine that the fundamental law was the law of reason and conscience, emanating directly from the people; the latter accused him of the "vicious method of assuming the existence, in Magna Carta, of a warrant for every legal principle of his own day."⁵ Miss Thompson's verdict is probably more just. "If," she holds, "we exclude the great controversial clauses . . . there are few major misinterpretations" (p. 360). This is a large "if"; but for the seventeenth century the important point was not what was true but what was believed to be true, and as Chief Justice Best later remarked, "We should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law."⁶

PAUL H. HARDACRE*

JUVENILE COURTS IN NORTH CAROLINA. By Wiley Britton Sanders. Chapel Hill: University of North Carolina Press, 1948. Pp. viii, 210. \$4.00.

This book is a complete survey, from all the official Juvenile Court records for the State of North Carolina, showing the trends in delinquency in that state from July 1, 1934 to June 30, 1944. This volume completes a quarter of a century of factual study for all of the Juvenile Courts in North Carolina. The other two surveys are referred to on page twelve in the Introduction. No other state has so complete a study.

This volume is replete with tables enabling one to group quickly the factual data and trends.

Part Three of the volume deals specifically with the Juvenile Court in North Carolina as it fits into the framework of the philosophy and ideals that brought the Juvenile Court into existence. This part of the book should be read by every citizen of North Carolina and is profitable reading for members of the bar and every one interested in the welfare of youth. Much is yet to be done in many places for the Juvenile Court, if it is to measure to the high standard attributed to it by the eminent Roscoe Pound in his declaration that it is the most important development in Jurisprudence since Magna Carta.

SAM DAVIS TATUM**

5. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 385 (2d ed. 1914).

6. 4 *DICTIONARY OF NATIONAL BIOGRAPHY* 697 (1937-38).

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